



**Shah & 4 others v Commissioner of Investigations and Enforcement
(Constitutional Petition E458 of 2022) [2023] KEHC 20180 (KLR)
(Constitutional and Human Rights) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 20180 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E458 OF 2022**

M THANDE, J

JUNE 30, 2023

BETWEEN

**PARESH JM SHAH 1ST PETITIONER
HITESH JM SHAH 2ND PETITIONER
SUBHASH J NAGDA 3RD PETITIONER
ASHOKKUMAR J NAGDA 4TH PETITIONER
PEARL INDUSTRIES LIMITED 5TH PETITIONER**

AND

**COMMISSIONER OF INVESTIGATIONS AND
ENFORCEMENT RESPONDENT**

JUDGMENT

1. Before me for determination is Petition dated September 26, 2022 in which the Petitioners seek the following orders:
 - A. A Declaration that the conduct of the Respondent evinced by frustrating the Petitioners and refusing to supply the information requested in the letter dated March 13, 2019 contravened; Articles 35 and 47 of *the Constitution of Kenya*.
 - B. An Order compelling the Respondent to supply the following information to the 3rd and 4th Petitioners:
 - I. The Investigation Report, whose findings established the existence of the “grand missing Supplier fraud” as stated in the



Respondent's Notice of Assessment and the objection decision letter.

- II. The evidence the Respondent claimed to be in its possession proved the Suppliers with whom the Petitioner transacted did not exist, did not supply goods and did issue fictitious invoices and ETR receipts for a commission as a sole preoccupation.
 - III. The evidence that supported the contention that the Suppliers were not registered for tax in Kenya.
 - IV. The false statements made by the petitioner to an authorized officer as alleged.
- C. A Declaration that the Respondent's conduct in issuing Agency Notices against the 1st to 4th Petitioners contravened; among other things, Articles 27, 35, 47 and 50 of the Constitution of Kenya
 - D. A Declaration that the respondent contravened the Petitioner's rights to movement and fair administrative action in issuing Prohibition Orders.
 - E. An order of compensation in favour of the Petitioners and to be borne by Respondent to redress the harm that the Petitioner has suffered on account of violation of their rights.
 - F. A Permanent Injunction against the Respondent, its officers, agents, servants, assigns, and persons under them from issuing Agency Notices against the 1st to 4th Petitioners without a court order lifting the veil of incorporation.
 - G. General and exemplary damages for the Respondent's high-handedness, harsh and unconscionable conduct.
 - H. Damages for loss of opportunities and loss of time.
 - I. The Respondent be condemned to pay the costs of this Petition on a full indemnity basis.
 - J. Such other orders this Honorable Court shall deem fit in the interest of justice.
2. The Respondent is described in the Petition as the Commissioner of Investigations and Enforcement, appointed under Section 3 of the Kenya Revenue Authority Act and mandated under Section 5 of the said Act with the responsibility of assessment, collection and accounting and the general administration of tax revenue on behalf of the Government of Kenya.
 3. A careful perusal of the said provisions does not support the description of the Respondent by the Petitioner. Section 3 of the Act provides:
 1. There is established an Authority to be known as the Kenya Revenue Authority.
 2. The Authority shall be a body corporate with perpetual succession and a common seal and shall, subject to this Act, be capable in its corporate name of—



a. suing and being sued:

Provided that any legal proceedings against the Authority arising from the performance of the functions or the exercise of any of the powers of the Authority under section 5 shall be deemed to be legal proceedings against the Government within the meaning of the *Government Proceedings Act* (Cap. 40);

b. taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;

c. borrowing or lending money;

d. doing or performing all other things or acts for the furtherance of the provisions of this Act, which may be lawfully done or performed by a body corporate.

1. It is clear that Section 3 of the Act provides for the establishment of the Kenya Revenue Authority (KRA). It further provides that KRA shall be a body corporate capable in its corporate name of suing and being sued and generally doing what body corporates are authorized in law to do. KRA is also capable of doing all other acts for the furtherance of the provisions of the Act. Section 5 stipulates the functions of KRA.

5. Notably, there is no mention in the said provisions of the Respondent. Section 13 of the *Act* provides for appointment of commissioners as follows:

1. The Board shall appoint, to the service of the Authority, such Commissioners as may be deemed necessary.

2. The Commissioner-General shall, with the approval of the Board, appoint such heads of departments as may be required for the efficient performance of the functions of the Authority.

3. The Commissioner-General shall appoint all other members of staff as may be required by the Authority for efficient performance of its functions.

4. The terms and conditions of all persons employed by the Authority shall be determined by the Board.

5. Except as may otherwise be determined by the Board in any particular case, an officer referred to in subsection (1), or in his absence the immediate deputy, shall be entitled to attend and participate in the deliberations of any meeting of the Board but shall have no right to vote.

6. The claim of the Petitioner by its nature ought to have been made against KRA which is a legal entity capable of being sued in its corporate name. Section 5 of the *Tax Procedures Act*, provides that the Commissioner may, in relation to a tax law, delegate in writing to an authorized officer the performance of any of the powers or functions of the Commissioner under that tax law, other than the power of the Commissioner under Section 4. The documents on record show that the matters complained of were done in the course duties of the Respondent as an officer of KRA. In this regard, the wording in Section 45 of the *Tax Procedures Act*, under which the departure prohibition order against the Petitioners was issued, is instructive. It provides that the Commissioner may issue a departure prohibition order



in relation to a person who may leave Kenya without paying a tax that is or will become payable by such person. The commissioner referred to in that Act, is the Commissioner-General and not the Respondent who signed the order. This Section reinforces the position that the Respondent cannot be sued in respect of acts done in the course of his duty as an officer of KRA. The Respondent can only be sued for being negligent in his duties, which is not the case herein.

7. In the case of *Housing Finance Company of Kenya Ltd v Embakasi Youth Development Project* [2004] eKLR, Ojwang, J (as he then was) considered a matter where the defendant was not a juristic person and had this to say.

There are also matters of law that I should set out here, as a basis for the resolution of the question raised in the Chamber Summons of 16th August, 2004. These are as follows:

1. The two cases sought to be relied on by the parties, albeit for different purposes, namely *Fort Hall Bakery Supply Co v Fredrick Muigai Wangoe* [1959] EA 474 and *Francis Karani Elijah & 2 others v Chairman (KANU) & 2 others*, Misc. Civil Case No 238 of 2002, for the purpose of the instant matter, speak authoritatively in the same terms : only a juristic person, that is an entity endowed with legal personality, can have locus standi before the Court, and can be the subject of rights and liabilities as may be declared by the Court. Court orders are not made in vain and are intended to be executed. Such execution is only possible in relation to entities endowed with legal personality. It follows that the notion that an entity lacking legal personality can seek orders of the Court or become the bearer of rights or liabilities declared by the Court, is totally inconsistent with the character and modus operandi of the Courts in the common law system. In this system, judicial orders may only be made where they are assured of enforcement and this assurance is secured by the effectiveness of the law relating to contempt of Court.
8. As indicated, when a court makes orders, it is intended that such orders are executed. Execution will not be possible against an entity lacking legal capacity. While the *Kenya Revenue Authority Act* confers upon KRA the capacity to sue and be sued in its corporate name, no such capacity has been conferred upon the Respondent, a commissioner appointed under Section 13 of the *Act*. As such, if the orders sought against the Respondent were to be made by this Court as sought, they will not be capable of enforcement or execution. Such orders if made, will therefore be in vain.
9. This joinder of the Respondent herein is sufficient to render the Petition incompetent. However, it is appreciated that this is a constitutional petition brought by the Petitioners claiming that their rights and fundamental freedoms in the Bill of Rights have been denied, violated and infringed. Article 22 of *the Constitution* allows them to approach the Court for enforcement of the Bill of Rights. In order to maintain the action under Article 22 of *the Constitution*, it is necessary that the proper party be joined as respondent.
10. In recognition of the fact that there will be cases of non-joinder or misjoinder of parties, Rule 5 of *the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* makes provision in respect thereof as follows:

The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—

- a. Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the



question as to which of the respondent is liable, and to what extent, may be determined as between all parties.

- b. A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.
 - c. Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.
 - d. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—
 - i. order that the name of any party improperly joined, be struck out; and
 - ii. that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.
 - e. Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.
11. Rule 5(a) is emphatic that a petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute. To correct a misjoinder or non-joinder, the Court is empowered either on application by a party or on its own motion, to order the striking out of a party improperly joined. The Court may also order the addition of any person who ought to have been joined, or whose participation in the matter before it may be necessary in order to enable the court adjudicate upon and settle the matter.
12. The above provision accords with Article 159(2)(d) of *the Constitution* which requires that justice shall be administered without undue regard to procedural technicalities. There is sufficient judicial authority for the proposition that courts of law are enjoined to sustain suits rather than terminate them on technicalities unless the case appeared hopeless and beyond redemption (see *DT Dobie Company (Kenya) Ltd v Joseph Muchina & Another* [1980] eKLR. This position is underpinned on the need to administer substantive justice.
13. In the end and in view of the foregoing, I direct that the Petitioners amend the Petition by joining KRA, which is the proper Respondent in this matter and against whom any orders, if granted, can be enforced. I further direct that the amended petition be filed within 21 days. Matter shall be mentioned on October 22, 2023 for compliance.

DATED AND DELIVERED IN NAIROBI THIS 30TH DAY OF JUNE 2023

M. THANDE
JUDGE



In the presence of: -

.....**for the Petitioners**

.....**for the Respondents**

.....**Court Assistant**

